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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 401

PVT. E2 DENNIS MORA,
PFC. E3 JAMES A. JOHNSON, and
PVT. E2 DAVID A. SAMAS,
Petitioners,

v.

ROBERT S. McNAMARA, as Secretary of Defense and
STANLEY RESOR, as Secretary of the Army
of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

ROBERT S. McNAMARA, as Secretary of Defense and
STANLEY RESOR, as Secretary of the Army
of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 20, 1967, affirming the order of the District Court dismissing the action for injunctive relief and a declaratory judgment.

THE OPINIONS BELOW

The opinion of the District Court Judge is printed in Appendix A hereto, p. 24. The Circuit Court of Appeals did not render a separate opinion in this case, but on stipulation of attorneys for petitioners and respondents made the court's decision in the case of *Luftig v. McNamara and Resor*, reported in 373 F.2d 664, applicable hereto. The per curiam judgment of the court is printed in Appendix B hereto, p. 25 and is unreported. The opinion of the Circuit Court of Appeals in *Luftig v. McNamara and Resor* is printed in Appendix C hereto, p. 26.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1967, Appendix B.

The order of this Court extending petitioners' time to file this Petition was made July 20, 1967, and is printed in Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the orders to petitioners dated June 8, 1966, to go to Vietnam are legal.

2. Whether the United States is engaged in a war in Vietnam in violation of the following treaty obligations and assurances:

(a) Kellogg-Briand Pact (Pact of Paris)

(b) Charter of the United Nations

(c) Nuremberg Judgment

(d) Geneva Agreement of 1954

(e) Southeast Asia Collective Defense Treaty (SEATO)

3. Whether the military conduct of the United States in Vietnam is a war in violation of Article I, Section 8, Clause 11 of the Constitution.

4. Whether the President by his agents, the respondents, is violating Article II, Section 3 of the Constitution of the United States by failing to faithfully execute the law of treaty obligations.

5. Whether the seizure and deployment of petitioners to Vietnam would violate their right of legal due process under the Fifth Amendment and whether the judiciary has the power to stay the Executive Branch of the Government from committing illegal acts which would subject petitioners to personal injury.

6. Whether the petitioners are subject to and bound by the following provisions of Department of the Army Field Manual, FM 27-10 (July 1956) (Chapter 8):

(a) Crimes under International Law, namely crimes against peace, crimes against humanity and war crimes (Section II, par. 498).

(b) Individual responsibility, even though he acted pursuant to an order of a superior authority a soldier has no defense to the violation of a war crime (Section IV, par. 509a).

7. Whether the United States in Vietnam is violating the Geneva Convention of 1949 to which respondents would subject petitioners.

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

A. CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 11

The Congress shall have Power * * *: To declare war * * *.

Article II, Section 3

* * * he [President] shall take Care that the laws be faithfully executed * * *.

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; * * *.

Article VI, Clause 2

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

B. TREATIES

(a) The Kellogg-Briand Pact

(b) The Charter of the United Nations

(c) The Nuremberg Judgment

(d) The Geneva Convention of 1949

(e) The Geneva Agreement of 1954

(f) The Southeast Asia Collective Defense Treaty.

Since the provisions of the treaties are lengthy, their pertinent texts are set forth in the Appendix E, p. 29.

STATUTES INVOLVED

1. Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88 Congress, 2d Session (all steps taken by the President in Southeast Asia shall be):

Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, there-

fore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member of protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

2. *The Law of Land Warfare*, Department of the Army Field Manual, FM 27-10, July 1956.

(a) *Chapter 1, Section 1, Paragraph 2:*

The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:

(a) Protecting both combatants and non-combatants from unnecessary suffering;

(b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and

(c) Facilitating the restoration of peace.

(b) *Chapter 1, Section 1, Paragraph 7b:*

Force of Treaties Under the Constitution. Under the Constitution of the United States, treaties constitute part of the 'supreme Law of the Land' (Art. VI, Cl. 2). In consequence, treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof.

(c) *Chapter 1, Section 1, Paragraph 9:*

Applicability of Law of Land Warfare in Absence of a Declaration of War. As the customary law of war applies to cases of international armed conflict and to the forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law. Similarly, trea-

ties relating to "war" may become operative notwithstanding the absence of a formal declaration of war.

(d) *Chapter 8, Section II, Paragraph 498:*

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

a. Crimes Against peace.

b. Crimes against humanity.

c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes."

(e) *Chapter 8, Section IV, Paragraph 509(a):*

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

(f) *Chapter 8, Section IV, Paragraph 511:*

The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

STATEMENT OF THE CASE

Petitioners Mora and Johnson were drafted into the United States Army on December 6, 1965; Samas was drafted on December 2, 1965.

On June 8, 1966, petitioners, then stationed at Fort Hood, Texas, received orders to report on July 12, 1966, to United States Army Overseas Replacement Station, Oakland, California, for deployment to Vietnam.

On June 30, 1966, petitioners held a press conference in New York in which they said they would not go to Vietnam.[1] That same day they brought this action for an injunction to restrain Robert S. McNamara, as Secretary of Defense, and Stanley Resor, as Secretary of the Army, from shipping them to Vietnam and for a declaratory judgment that they not be made to commit illegal acts.

The complaint alleged that the war being waged by the United States in Vietnam violates the following laws and treaties entered into by the United States and the Constitution of the United States:

(a) Kellogg-Briand Pact.

(b) Charter of the United Nations.

(c) Nuremberg Judgment.

(d) Geneva Agreement of 1954.[2]

(e) Southeast Asia Collective Defense Treaty of 1954.

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[1] "We were all of the same opinion that should we receive orders to go to Vietnam we would definitely take a stand and refuse to go. Our reasons were that the war was illegal and immoral. I feel this is a war of aggression because the United States has committed troups to Vietnam without having a declaration of war. It has bombed a country which we are not at war with. We could not bring ourselves to do something contrary to our beliefs and involve ourselves in something which we would consider criminal".

[2] To which United States gave assurance it would abide by its terms. Appendix E, hereto.

(f) Article I, Section B, Clause 11 of the Constitution of the United States.

(g) Article II, Section 3 of the Constitution of the United States.

The complaint further alleged that the deployment of petitioners to Vietnam would deny them due process of law under the Fifth Amendment to the Constitution of the United States.

On a motion for a preliminary injunction the complaint was dismissed *sua sponte*.

REASONS FOR GRANTING THE WRIT

In sustaining the judgment below, the Court of Appeals in a *per curiam* judgment erred in failing to distinguish an important factual situation between this case and that of *Luftig v. McNamara, et al., supra,* namely that Luftig had not received orders to go to Vietnam whereas these petitioners had received such orders and their legal rights were being immediately affected.[3] The affirmance was predicated upon two propositions of law:

1. That the relief sought represented a claim for judicial review of political questions beyond its jurisdiction.

2. That it was an unconsented suit against the United States.

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[3]Seven days after the commencement of this action for an injunction their orders to go to Oakland, California, for deployment to Vietnam were modified and they were arrested with no charges filed against them. Two days after the District Court dismissed the complaint they were given orders to board transportation to go to Vietnam, which they refused as they previously said they would. On September 6, 7, 8 and 9, 1966, they were court-martialed and sentenced to confinement for three years (Mora) and five years (Johnson and Samas). On appeal to Military Review Board the sentences of Johnson and Samas were reduced to three years.

The opinion of affirmance held that the division of authority established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; that these are matters within the exclusive province of Congress and the Executive.

The opinion cited cases which are easily distinguishable but failed, as the lower court did, to mention *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579; *Baker v. Carr*, 369 U.S. 186, and *Nixon v. Herndon*, 273 U.S. 536, which are in point and were cited extensively in all courts by petitioners.

In *Nixon v. Herndon*, *supra*, p. 540, this Court struck down the defense of "political question" where recovery was sought for private damage, saying:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since (cases cited) and has been recognized by this court (cases cited).

Likewise in *Baker v. Carr*, *supra*, p. 209, this Court held that a defense of "foreign policy question" does not deprive the court of jurisdiction.

> Of course the mere fact that the suit seeks protection of political right does not mean it presents a political question. Such an objection "is little more than a play upon words." (citing *Nixon v. Herndon*, *supra*.)

and at page 211, this Court further held:

> Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its man-

> agement by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action" * * * must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer.

"Recognition of belligereney abroad is an executive responsibility" this Court nevertheless further held in *Baker v. Carr, supra*, p. 212:

> * * * if the executive proclamations fall short of an explicit answer a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative.

With the increase of the Federal power both nationally and internationally more and more situations come within the orbit of the loose definition of a "political" question. Concomitantly the courts have extended the Constitution to guard the individual and preserve his constitutionally protected rights. In 1960 Mr. Justice Douglas said in the James Madison Lecture at New York University, "But the 'political' question should no longer be used as a thicket behind which the judiciary retreats."[4]

Injunctive relief is proper against an officer of the sovereign when his acts are constitutionally void and would deprive anyone of life, liberty or property wihout due process of law. (*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1948), citing *United States v. Lee*, 106 U.S. 196.)

The lower courts erred in immunizing respondents on the ground that they are acting for the President. This Court has

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[4] *The Great Rights*, pp. 136, 137, edited by Edmund Cahn, The Macmillan Company, New York.

has held that such immunity is non-existent when irreparable injury will be suffered unless injunctive relief is granted. In *Youngstown Sheet and Tube Co. v. Sawyer, supra*, this Court came to grips with this question and resolved it against the President and his agent, Secretary of Commerce Sawyer:

> The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives content to undefined provisions in the frame of our government.
>
> It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he asked to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay on behalf of the Court, wrote thus to the Father of his Country:
>
> We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision and firmness will surmount every obstacle to the preservation of the rights of peace, and dignity of the United States.
>
> In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.

That private rights may derive from treaties and the power of the Courts to adjudicate the decisions of the President was stated by Mr. Justice Douglas in his James Madison Lecture at New York University in 1960 (pp. 134, 135):[5]

> Another group concern functions specifically assigned by the Constitution to a particular department. Treaty-making authority is one example. The power to conduct foreign affairs, including the decision to recognize or not to recognize a particular regime, is another.
>
> Yet even though power is given exclusively to one department to do a certain act, when the power is exercised, justiciable rights may arise. Private rights commonly derive from treaties. The Chief Executive, as Commander-in-Chief, makes decisions in which no one else can participate. But what he does often give rise to claims that courts should adjudicate.

1. International Treaties Have the Force of Law and United States War Action in Vietnam Is in Violation Thereof.

Article VI, Clause 2 of the Constitution in clear unequivocal language provides that Treaties are the Supreme law of the land and all judges are bound thereby. (*The Habana*, 175 U.S. 677, 700; *Missouri v. Holland*, 252 U.S. 416; *Hines v. Davidowitz*, 312 U.S. 52, 62-63; *United States v. Pink*, 315 U.S. 203, 230-231; *Clark v. Allen*, 331 U.S. 503-508.)

There is a duty that the Courts take judicial notice of treaties and apply their provisions to private rights. (*San Lorenzo Title and Improvement Co. v. Caples*, 48 S.W.2d 329, 331; 134 A.L.R. 883.)

The construction and application of treaties wherever necessary are as any other laws, to be considered and determined by the courts. (*The Frances Louise*, 1 F.2d 1004, app. dis. in *United States v. Beckman*, 270 U.S. 666.)

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[5] See note 4.

While great weight will be given to the construction of a treaty by the Executive Department if and when made, the question itself is judicial in its nature. (*The Sophie Rickmers*, 45 F.2d 413.)

The United States has entered into many treaties outlawing wars:

(a) *The Kellogg-Briand Pact* (Pact of Paris)[6] 46 Stat. 2343. The provisions renouncing wars are set forth in pendix E hereto.

(b) *The Charter of the United Nations*, 59 Stat. 1031, is recognized as a treaty under international law.[7] The pertinent provisions are set forth in Appendix E hereto. Unilateral action by any member without the sanction of the United Nations has been condemned.[8]

(c) *Nuremberg Judgment*. A Resolution adopting the principles of the Judgment was passed at the Fifty-fifth plenary meeting of the General Assembly of the United Nations on December 11, 1946. The Resolution is set forth in full in Appendix E, hereto. When the United States violated the assurance it gave to abide by the conditions of the Geneva Agreement of 1954 it violated Article 6(a) of the Nuremberg Judgment.[9]

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[6] "Being permanent in its nature and purpose and representing a fundamental change in the legal structure of international society, the Pact of Paris must be regarded as continuing in being and as one of the corner-stones of the international legal systems." L. Oppenheim and H. Lauterpacht, p. 197.

[7] Ambassador Arthur J. Goldberg, former Associate Justice of the Supreme Court of the United States, quoted in an article in *The New York Times*, February 6, 1966: "Sometimes, just because the United Nations is such a great concept, we forget that the Charter is also a legal document, a treaty, and we're bound by it—we have treaty obligations.

[8] The Sinai Peninsula incident in 1956.

[9] See assurance given by United States with respect to Geneva Agreement of 1954 in Appendix E, hereto.

The same principles of the Nuremberg Judgment governing crimes under international law were adopted by the Department of the Army on July 13, 1956, and contained in its Field Manual FM 27-10, paragraph 498.[10]

(d) *The Geneva Agreement of 1954* recognized Vietnam as a single state[11] and therefore the armed conflict that thereafter started was a civil war.[12] (67 Corpus Juris 336, 337 and note 16; Black's Law Dictionary, 2d ed., p. 1217.)

When the United States took over the fighting in Vietnam it violated Article 2(4) of the Charter of the United Nations. (Appendix E, hereto.)

(e) *The Southeast Asia Collective Defense Treaty (SEATO)*[13] offers no legal support to the United States for its engagement in the war in Vietnam. The members of SEATO would not vote for such action or to support the United States in its war in that area. Even if SEATO had so voted prior approval by the Security Council of the United Nations would have been necessary under Chapter VIII, Article 53, set forth in Appendix C, hereto.

Nor can the unilateral action by the United States in Vietnam be legally justified under this Treaty since Article 4 thereof states that members may "act to meet the common danger in accordance with its constitutional processes." There is no constitutional process that can be offered as a justification for the acts of war being committed daily in Vietnam.

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[10] *Supra*, p.

[11] Appendix E, hereto.

[12] *A Modern Law of Nations*, pp. 165-166, Prof. Philip C. Jessup; 57 *American Society of International Law Proceedings*, p. 152, by Prof. Louis Henkin; *Moore's Digest of International Law*, Vol. 2, p. 412.

[13] Created September 8, 1954, nineteen days after the Geneva Agreement, by Australia, France, New Zealand, Pakistan, Philippines, Thailand, United Kingdom and United States.

2. The Military Conduct of the United States in Vietnam Without a Declaration of War by Congress Violates Article 1, Section 8, Clause 11 of the Constitution.

Without any declaration of war by Congress the United States is engaged in an extensive war campaign in Vietnam.

(a) United States troop commitments in Vietnam number about 450,000.

(b) United States casualties in Vietnam were reported on June 17, 1967, as 11,099 killed, 1,966 non-combatant deaths, 67,083 wounded and 559 missing.[14]

(c) The United States has established military bases in South Vietnam, Thailand and Guam.

(d) All four branches of our military are involved in Vietname, the Army, Navy, Marine Corps and Air Force.

(e) United States forces have been engaged in actual combat in Vietnam since January 1, 1961.

(f) The United States has conducted air strikes and ground fighting and the use of chemical warfare against military personnel, installations and the civilian population.

(g) The United States is in joint, if not sole, command of the military forces in South Vietnam.

(h) A "Cold War G.I. Bill of Rights" for those who have served in the armed forces after January 31, 1955, has been passed by Congress into law.

(i) The appropriation for the 1967-1968 war budget in Vietnam is now $20 billion dollars.

This is a war being conducted by the President and his subordinates, the defendants herein, without a declaration of war by Congress. (*Ex Parte Milligan*, 4 Wall. 2.)

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[14] When the Brief to the U. S. Court of Appeals for the District of Columbia was filed in *Luftig*, these casualties as of March 3, 1966 were 3,662 killed, 640 non-combatant deaths, 20,244 wounded and 275 missing.

The war by the United States in Vietnam violates international law. (*An Introduction to International Law*, p. 61, J. G. Starke.)

The Constitution vests in Congress alone the power "to declare war," Article I, Section 8, Clause 11. But a declaration by the President of an emergency and his assumption of powers as wartime Commander-in-Chief of the Army and Navy, is the equivalent of a declaration by the President of a state of war. The actions taken under such conditions are justiciable.[15]

3. It is the Duty of the Respondents To Take Care That the Laws Be Faithfully Executed.

Article II, Section 3 of the Constitution imposes the duty upon the President of the United States to see that laws are faithfully executed. This does not mean some laws or only those selected, but all the laws of the land. Under Article VI, Clause 2, these include treaties made with other nations, including the Charter of the United Nations.

By the language of this Constitutional duty of the President, the subordinates to whom such "care" is entrusted bear the same responsibility and in this instance, the respondents.

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised

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[15] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579;
Little v. Barreme, 2 Cranch 170;
Ex Parte Milligan, 4 Wall. 2;
Mitchell v. Harmony, 13 How. 115;
Duncan v. Kahanamoka, 327 U.S. 304;
Sterling v. Constantin, 287 U.S. 378;
The Orano (CC), 1 Gall 137, F. Cas. No. 10585.
Galston v. Hoyt, 3 Wheat 246;
Filbin Corp. v. United States (D.C. S.C.), 266 F. 911;
Ex Parte Merryman (CC), Taney 246, F. Cas. No. 9487.

by him through the head of the appropriate department, whose acts become the President's acts.[16]

This action for injunctive relief to prevent the seizure and deployment of petitioners to engage in an illegal act (the war) is not an action against the United States, but a challenge to respondents' authority and the abuse of their powers. (*Philadelphia v. Stimson*, 223 U.S. 605, 620.)

4. The Seizure and Deployment of Petitioners to Vietnam Would Violate Their Right of Legal Due Process Under the Fifth Amendment.

The petitioners' personal rights should be equal to if not greater than property rights. The respondents cannot seize and enlist petitioners to engage in an illegal war any more than they can seize private property without lawful authority.

The legal right of petitioners to the injunctive relief sought herein is supported by *Youngstown Sheet and Tube Co. v. Sawyer, supra.* In this case the Court struck down the power of the President to seize steel plants under an executive order. This Executive Order was made in the face of a possible steel strike during the Korean conflict and on the mistaken legal assumption that the President had this power as the Nation's Chief Executive and the Commander-in-Chief of the Armed Forces of the United States.

In *Youngstown, supra,* this Court held that the seizure order could not be sustained "* * * as an exercise of the President's military power as Commander in Chief of the Armed

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[16] Wilcox v. McConnell, 13 Pet. 498, 513 (1839);
United States v. Eliason, 16 Pet. 291 (1842);
Williams v. United States, 1 How. 290, 297 (1843);
United States v. Jones, 18 How. 92, 95 (1865);
The Confiscation Cases, 20 Wall. 92 (1874);
United States v. Farden, 99 U.S. 10 (1879);
Wolsey v. Chapman, 101 U.S. 755 (1880);
In re Neagle, 135 U.S. 1 (1890).

Forces * * * Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power power to the President."

Mr. Justice Jackson, in a concurring opinion, in *Youngstown v. Sawyer, supra* (p. 633), thought that the seizure would give to the President not only the power to execute the laws under Article 2 of the Constitution, but to make some. Writing of the President's power, he said (p. 646):

> What the power of command may include, I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.

The seizure of petitioners by respondents, not less than the seizure of the steel plants, is protected by due process of law under the Fifth Amendment (*Youngstown v. Sawyer, supra*). The summary violation by respondents of lawful mandates and constitutional restrictions imposed upon them, to the injury of petitioner, constitutes a violation of petitioners' right of due process of law.

The existence of a state of war does not suspend or change the operation of the guarantees and limitations of the Fifth Amendment conferred upon citizens by the Constitution. (*United States v. Cohen Grocery Co.*, 255 U.S. 81.)

The legal power of the respondents to ship petitioners to Vietnam rests upon weaker grounds than the government's seizure of the steel plants in *Youngstown v. Sawyer, supra.* There the government failed to sustain its position even in the light of the Korean conflict, a United Nations action. In Vietnam there has been no such approval by the United Nations. The violation of our treaty obligations is clearly and unequivocally in contravention of our Constitution.

5. United States Action in Vietnam Violates the Laws of Land Warfare and Petitioners' Participation Would Make Them Guilty Under International Law.

The character of the conduct of the United States in Vietnam raises serious questions concerning violations of the laws of land warfare.

The signators to the Geneva Convention of 1949 regulating the treatment of prisoners and the wounded and sick, and the protection of civilians, include virtually all the nations of the world. The United States has also signed and ratified the earlier Hague Conventions dealing with some of the same subjects. The Department of the Army Field Manual, FM 27-10 specifically observes that treaties constitute the "supreme law of the land", their provisions "must be observed by both military and civilian personnel" (the provisions are set forth on p. 5, *supra*).

The Law of Land Warfare, FM 27-10, Chapter 1, Section 1, Paragraph 2, sets forth what are specific acts constituting violations of Laws of War. (The provisions appear on p. 5, *supra*.)

6. Treatment of Prisoners.

The United States' active participation in the war has made it a party to the torture of prisoners and acquiescence by others committed in the presence of United States military personnel. Professor Greenspan in his treatise *The Modern Law of Land Warfare* states the law: "In accordance with the general principles of criminal law regarding complicity, the accomplice is accountable for crimes committed in furtherance of the common purpose, even though he himself did not commit the actual crimes" (469). *The Dachau Concentration Camp Trial* (Trial of Weiss, et al.) (1945) U.S. Gen. Mil. Govmt. Ct., L. R. T. W. C., XI, 12-16 is authority for the proposition that where "a common design to violate the laws and usages of war is established, everybody taking part in the common design is guilty of war crime,

though the nature and extent of the participation may vary" (469).

Under Article 17 of the Geneva Convention on Prisoners, a prisoner of war need only give his name, rank, date of birth and serial number and that "no physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever."

Eyewitness reports include the following instances of torture of Viet Cong prisoners: "bambo slivers run under their fingernails or wires from field telephone connected to arms, nipples, or testicles" (Newsweek correspondent William Touhy, New York Magazine, Nov. 28, 1965); dunking men head first into water tanks or slicing them up with knives" (Chief correspondent, London Sunday Mirror, Donald Wise, April 4, 1965); "the 'ding-a-ling' method of interrogation involves connection of electrodes from this [U.S. field] generator to the temples of the subject * * * in case of women prisoners * * * to the nipples" (Malcolm Browne, Pulitzer Prize winning A.P. reporter in *The New Face of War*); "cutting off the fingers, ears, fingernails or sexual organs * * * One American installation has a Viet Cong ear preserved in alcohol" (Beverly Deepe, Herald Tribune Saigon correspondent, April 25, 1965); "they get a Viet Cong and make him hold out his hands against his cheeks, then they take this wire and run it right through the one hand and right through his cheek and into his mouth. * * * Oh you ought to see how quiet them gooks sit in a helicopter when we got them wrapped up like that", a young U.S. Marine quoted by Jimmy Breslin, New York Herald Tribune correspondent, September 29, 1965.

Article 12 of the Geneva Convention on Prisoners requires a country to guarantee the treatment of prisoners it turns over to others.

Even before the Geneva Convention of 1949, United States war crimes tribunals had rules that torture and killing of prisoners of war is a war crime. *Trial of Yoshio Makizawa*

(1946) U.S. Mil. Commission, Shanghai, L. R. T. W. C. XV, 101; releasing prisoners to the custody of others where they are likely to be killed was held to be a crime in *The Jaluit Atol Case* (Trial of Aeuberger) (1946) Br. Mil. Ct. Germany, *ibid.*, 81.

In the case of *In re Yamishita*, 327 U.S. 1 (1946), the United States Supreme Court held that Yamishita had violated the laws of war by failing to control his troops from committing brutalities against prisoners and civilians.

Article 13 of the Geneva Convention on Prisoners of War states that "measures of reprisal against prisoners of war are prohibited."

The continued bombings of North Vietnam by the United States causing death of civilians and non-military objects are the acts to destroy persons and property protected by the laws of the United States through our treaty obligations. *The Belsen Trial* (Trial of Kramer, et al.) established the rule that "a systematic course of conduct" was sufficient to prove intent.

The Charter of the United Nations makes illegal the threat or use of force contrary to the purpose of the United Nations—however, a non-member nation or a member nation which violates these provisions of the Charter commits a further breach of international law by commencing hostilities without a declaration of war or a conditional ultimatum as required by the foregoing articles of Hague Convention No. 111. Conversely, a state which resorts to war in violation of the Charter will not render its acts of agression or breach of the peace any the less unlawful by formally declaring war.

CONCLUSION

Had the petitioners acted in obedience to the orders to go to war in Vietnam, they would have been guilty of war crimes. It would have been no defense that they acted pursuant to orders of a superior officer.[17]

The action for injunctive relief having been denied by the courts below, these petitioners have been found guilty by courts-martial and sentenced to serve prison terms.

A court of law should determine whether the President through his subordinates, respondents herein, is exceeding his powers as Commander-in-Chief under circumstances where there has been no declaration of war by Congress. The petitioners should be allowed their day in court to prove that the orders given to them to go to Vietnam were illegal orders and they should not have been court-martialed until that issue was decided.

WHEREFORE, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

STANLEY FAULKNER
SELMA W. SAMOLS
Attorneys for Petitioners

Dated: July 20, 1967

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[17] Law of Land Warfare, U. S. Department of Defense Manual FM 27-10, Chapter 8, Section IV, Paragraph 509(a), *supra*, p. 6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the within document upon all parties of record in this proceeding by mailing via first class mail, postage prepaid, a copy to each party. I further certify that I have this day mailed to the United States Attorney for the District of Columbia, the Attorney General of the United States and the Solicitor General of the United States copies of this document.

SELMA W. SAMOLS

Dated: New York, N. Y.
July , 1967

APPENDIX A

Opinion of the District Court for the District of Columbia

July 11, 1966

[2] The propriety of transferring a member of the Armed Forces from one part of the world to another is not only political, but a military question over which courts have no jurisdiction.

Furthermore, this suit is, in reality, a suit against the United States, and the United States has not consented to be sued.

In addition, it is not the function of the judiciary to entertain such litigation which challenges the validity, the wisdom or the propriety of the Commander-in-Chief of our Armed Forces abroad.

The issue presented involves a challenge to the conduct of not only diplomatic but foreign affairs over which the President is exclusively responsible.

The motion is denied, and the case is sua sponte dismissed. Counsel for the Government will prepare the proper order.

(Thereupon, the above proceedings were concluded.)

APPENDIX B

Per Curiam Judgment of the United States Court of Appeals for the District of Columbia Circuit

On consideration of appellees' motion to affirm the judgment of the District Court and it appearing that proceedings in this appeal were ordered held in abeyance and that a similar judgment would be entered in this case upon the entry of a judgment in the case of *Luftig v. McNamara, et al.*, No. 20,129, and it appearing that a judgment in said case was filed on February 6, 1967, it is

ORDERED AND ADJUDGED by this court that the judgment of the District Court appealed from in this cause be and it is hereby affirmed.

Per Curiam.

APPENDIX C

Opinion of the United States Court of Appeals for the District of Columbia Circuit in Luftig v. McNamara, et al.

Per Curiam: This is an appeal from dismissal of a suit for declaratory judgment and injunctive relief brought by Appellant, a private in the Army of the United States, to enjoin the Secretary of Defense and the Secretary of the Army from sending him to Viet Nam. He claims that American military action in Viet Nam is unconstitutional and illegal and that Appellees have no lawful authority to assign him there.[1] Appellant does not challenge the legality of his induction and does not seek release from military duty.

The complaint is entitled in terms of a suit against individual officials of the United States government; in legal effect it is plainly a suit against the United States acting through these officials.

The District Court *sua sponte* ordered dismissal of the complaint on the ground that the relief sought represented a claim for judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States.

The District Court was, of course, eminently correct on both its primary and alternative grounds for dismissal; these propositions are so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands.

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude.

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[1] This is Appellant's second attempt to have a Federal court hold the war illegal. His prior suit was dismissed, Luftig v. Ferguson, No. 44700, N.D.Cal., Feb. 18, 1966.

The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Eminente v. Johnson*, __ U.S. App. D.C. __, 361 F.2d 73, *cert. denied*, 385 U.S. 929 (1966); *Pauling v. McNamara*, 118 U.S. App. D.C. 50, 331 F.2d 796 (1963), *cert. denied*, 377 U.S. 933 (1964); *Pauling v. McElroy*, 107 U.S. App. D.C. 372, 278 F.2d 252, *cert. denied*, 364 U.S. 835 (1960).

Affirmed.

APPENDIX D

Order Extending Time To File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 20th, 1967.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 8th
day of May, 1967.

APPENDIX E

Treaties

1. *Kellogg-Briand Pact* (46 Stat. 2343).

Article 1:

> The High Contracting Parties solemnly declare in the names of the respective peoples that they condemn recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another.

2. *The Charter of the United Nations* (59 Stat. 1031).

Chapter 1, Article 2(4):

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purpose of the United Nations.

Chapter VII, Article 39:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or shall decide what measures shall be taken * * * to maintain or restore international peace and security.

3. *The Nuremberg Judgment.* International Military Tribunal and the Charter of the Tribunal (59 Stat. 1544).

II. Jurisdiction and general principles

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes; namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(e) Crimes Against Humanity; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts, performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior

shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article II, Sec. 2 of Law No. 10, provided for individual responsibility for the crimes defined in Section 1 as follows:

2. Any person, without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he

a) was a principal or

b) was an accessory to the commission of any such crime or ordered or abetted the same or

c) took a consenting part therein or

d) was connected with plans or enterprises involving its commission or

e) was a member of any organization or group connected with the commission of any such crime or

* * *

Charter of the International Military Tribunal for the Far East, January 19, 1946.

The Charter was approved by the Supreme Commander for the Allied Powers January 19, 1946; it was amended by order of the Supreme Commander, General Headquarters, OPA 500, April 26, 1946. (Treaties and Other International Act Series 1589; Dept. of State Publication 2613; A decade of American Foreign Policy, 1941-1949, Senate Document 123, 81st Cong., 1st Session, p. 961.)

The Charter provides in pertinent part:

II. Jurisdiction and general provisions

Article 5. Jurisdiction Over Persons and Offenses.

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes Against Peace:** Namely, the planning, preparation, initiating or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **Conventional War Crimes:** Namely, violations of the laws or customs of war;

(c) **Crimes Against Humanity:** Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, * * * whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation of execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Affirmation of the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.

On motion of the United States the first session of the General Assembly of the United Nations unanimously adopted a resolution affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal. [Res. 95 (I), adopted 11 December 1946; The

United States and the United Nations: Report by the President to the Congress for the year 1946, Dept. of State Pub. 2735, pp. 129-130; a Decade of American Foreign Policy, 1941-49, p. 965.]

95 (I). **Affirmation of the Principles of International Law recognizing by the Charter of the Nurnberg Tribunal**

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal.

4. *Geneva Convention of 1949.*

Article 12:

Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individuals' responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Article 17:

No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

5. *The Geneva Agreement of 1954.* (Final Declaration)

(6)

The Conference recognizes that the essential purpose of the agreement relating to Vietnam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and shall not in any way be interpreted as constituting a political or territorial boundary. * * *

(7)

The Conference declares that, so far as Vietnam is concerned, the settlement of political problems effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July, 1956, under the supervision of an International Commission. * * *

Declaration of the United States:

> * * * [R]efrain from threat or the use of force to disturb them, in accordance with Article 2(4) of the Charter of the United Nations dealing with the obligations of members to refrain in their international relations from the threat or use of force * * * (Extract from Verbatim Records of Eighth Plenary Session).

6. *The Southeast Asia Collective Defense Treaty* (SEATO)

Preamble and Article 1:

> In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other International Agreement, their obligations under the present Charter shall prevail.

Chapter VIII, Article 53:

> (1) The Security Council shall where appropriate utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against an enemy state, as defined in para. 2 of this Article. (enemy state applies to an enemy of any present Charter member during World War II.)